

SUPREME COURT OF THE UNITED STATES

Answer
OCTOBER TERM, 1943

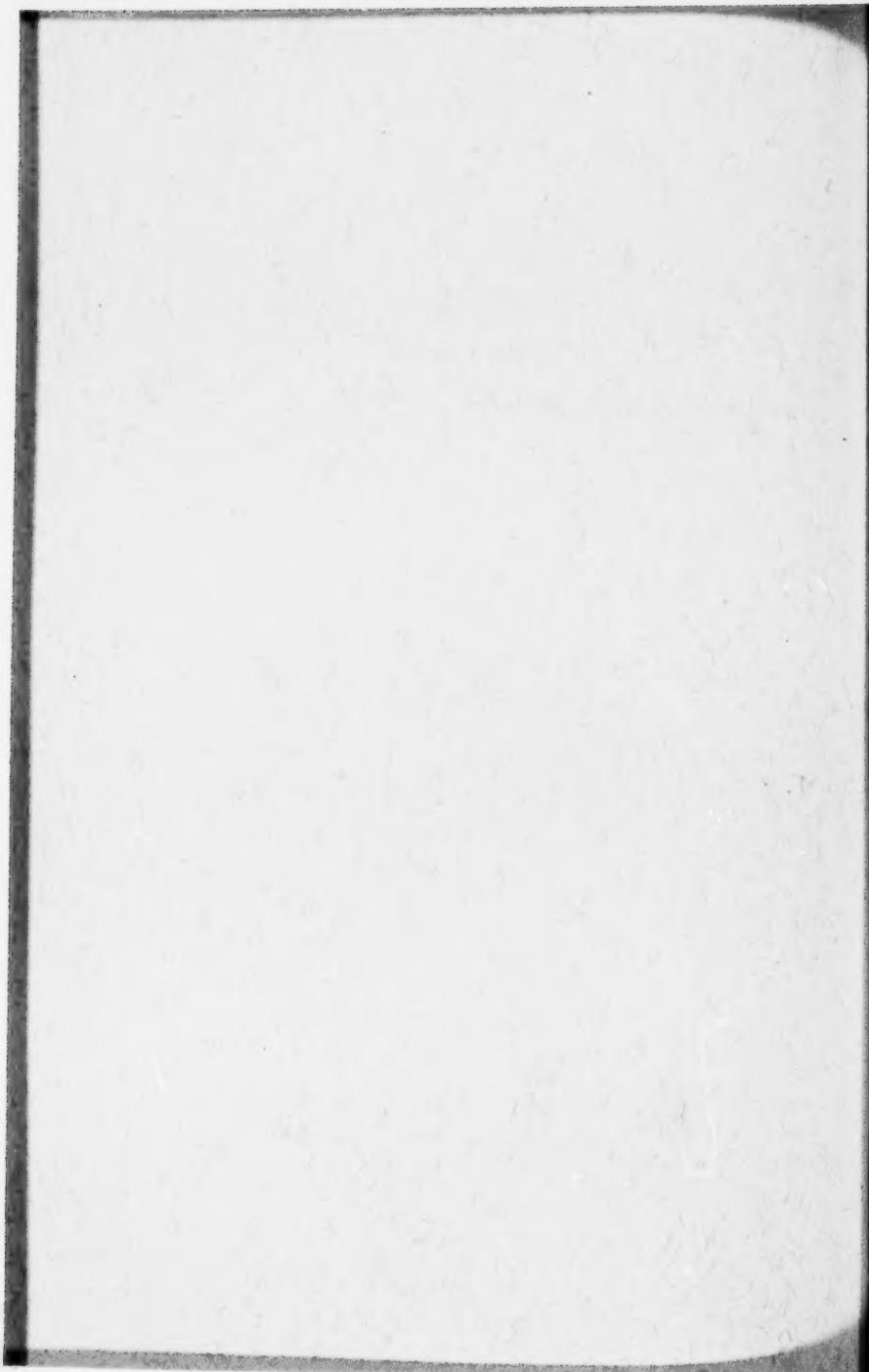
No. 595

CO-OPERATIVE TRANSIT COMPANY,
Petitioner,
vs.

HYPHA DAYOUB.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.

GORDON D. KINDER,
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Counsel for Petitioner.



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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE SIXTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Co-operative Transit Company respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, in the above-entitled cause, docket number 9484, decided on the 13th day of October, 1943, and upholding the judgment of the District Court of the United States for the Southern District of Ohio, which was in favor of the respondent.

Statement.

This cause grows out of an appeal by the petitioner from an adverse judgment in the District Court of the United States for the Southern District of Ohio. Hypha Dayoub,

the respondent, was plaintiff in the action in the trial court and claimed damages for alleged injuries which she asserted were caused by the movement of a street car of the petitioner on which she was a passenger, alleging in her petition that the petitioner started its street car with a sudden, unusual, violent and abrupt jerk, thereby causing the plaintiff to lose her balance and that her claimed injuries resulted directly and proximately from such negligence. The petitioner's answer consisted of a general denial and a second defense setting up contributory negligence. Motions for a directed verdict were made by the petitioner at the close of the plaintiff's evidence and at the close of all the evidence.

After charging the jury the trial court submitted four interrogatories to the jury, in answering one of which the jury found that the plaintiff was guilty of negligence which directly and proximately contributed to cause her injuries, this interrogatory being returned with the general verdict, which was for the plaintiff in the amount of \$2,000.00, and the answers to three other interrogatories wherein the jury answered that the petitioner's car was started with an unusual jerk which directly and proximately caused plaintiff's injuries. The court, when the answers to the interrogatories were read, directed the jury's attention to the inconsistency between the general verdict and the answer to the contributory negligence interrogatory, reread to the jury that part of the charge which pertained to the issue of contributory negligence, told the jury that its finding of contributory negligence was inconsistent with the general verdict and that its general verdict should be changed or the jury's answer to the interrogatory should be changed and returned the jury for further consideration. The jury thereupon changed its answer to the contributory negligence interrogatory from "yes" to "no" and judgment was in due course entered on the general verdict.

The respondent in her testimony adjectively characterized the motion of the car as a sudden and violent jerk, but introduced no testimony whatever as to the effect of the motion of the car on other passengers, two of whom were standing on the front platform and who testified that their upright position was changed in no way by the motion of the car. One witness, who claimed to be standing on the sidewalk near the car said that the car started with a violent jerk and another witness testified that the car was "terribly shaking." Four passengers who were seated in the car testified that they were not thrown forward or backward by the motion of the car.

Questions of Law Presented.

1. Whether, when the trial court returned the jury for further consideration under Rule 49 of the Rules of Federal Procedure, it was error for the court to specifically call the jury's attention to its answer to the interrogatory, which was inconsistent with the general verdict in that it found the plaintiff guilty of contributory negligence, and for the court to reread to the jury that part of the general charge dealing with contributory negligence and to tell the jury what effect its answer to the interrogatory would have on the general verdict and how its answer should be changed in order to be in harmony with the general verdict.

2. Whether, in an action brought by a passenger against a street railway company in which the plaintiff claims to have been thrown off balance by the motion of the street car, the characterization of the movement of the car as a sudden, violent and unusual jerk, without proof of corroborative, supporting facts, justifies a recovery.

Reason for Granting Petition.

1. This case involves an interpretation of Rule 49 of the Rules of Federal Procedure which has not been, but should be, settled by this court.

2. The lower appellate court has misapplied the decisions of the Supreme Court of Ohio holding that adjective characterization of a jerk as unusual, sudden or violent, without supporting proof, does not justify recovery.

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